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## Liau Choy Wan v Public Prosecutor

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HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 41S-23–12 OF 2015
COLLIN SEQUERAH J
7 JUNE 2017

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*Criminal Procedure — Sentencing — Appeal against sentence — Factors to be considered — Public interest — Whether public interest outweighed interests of appellant — Whether deterrence was necessary in order to prevent occurrence of breach of peace — Mitigating factors — Whether magistrate had taken into consideration mitigating factors raised by appellant — Whether fact that offence was compoundable meant that it was not trivial in nature — Whether magistrate had erred — Whether sentence passed was according to law*

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On 8 April 2014, the appellant, a bank officer had hurled certain abusive insults at a customer of the bank. The customer complained that the insults or racial slurs were provoking enough to cause a breach of the peace. The appellant was charged with intentionally insulting the customer of the bank to provoke a breach of the peace, an offence under s 504 of the Penal Code. The appellant claimed trial to the charge. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to six months imprisonment. The appellant appealed against the sentence and argued that the magistrate had given undue emphasis on deterrence without any consideration of the mitigation aspects. The appellant submitted that she was a first offender and as an officer of the bank, was an asset to society. It was further submitted that as no violence had actually occurred, the sentence passed was grossly excessive.

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**Held**, dismissing the appeal:

(1) It is well settled law that the paramount consideration of a court hearing an appeal against sentence is public interest. In the case of an offence under s 504 of the Penal Code, the public interest is the prevention of insults that gives rise to provocation likely to cause a breach of peace. The insulting comments of the appellant in the present case were likely to result in racial unrest or breach of peace occurring, in the context of the multi-racial society in which we exist. Therefore, such insults should not go unchecked. This was one situation where a policy of deterrence was absolutely necessary. The injunction against the use of racial slurs would apply to all sections of our multi-racial society irrespective of the ethnicity or station in life of the person in question. In this respect the equality before the law provision guaranteed in art 8 of the Federal Constitution

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ought to resonate among all sections of our society. In the circumstances a deterrent sentence would best achieve the ends of justice not only for the appellant but also for society at large. This was one offence where deterrence was necessary in order to prevent the occurrence of a breach of peace rather than waiting for it to break out before taking action (see paras 5–14 & 27).

(2) Contrary to the appellant's submission, the magistrate had taken into consideration the mitigating factors raised by the appellant before deciding that the offence committed by the appellant, which was not trivial in nature, warranted the six months imprisonment. When the competing interests of the public and that of the appellant were weighed on the scales of justice, the public interest outweighed the interests of the appellant. Further, the plea of mitigation that no actual violence was actually occasioned was irrelevant because s 504 does not necessarily require a breach of peace to have occurred. A mere possibility was enough (see paras 16–17 & 27).

(3) The magistrate was right in observing that the seriousness of the offence was reflected by Parliament's intention of imposing a prison sentence before that of a fine. This was a relevant factor to consider in determining the seriousness of the offence. The fact that the offence was compoundable did not mean that it was trivial in nature. Further, the imposition of only a fine would not reflect the gravity of the offence and would result in sending out a wrong message to the public at large. Thus, the magistrate had not erred in principle and the sentence passed was according to law (see paras 19, 23 & 30–31).

**[Bahasa Malaysia summary**

Pada 8 April 2014, perayu, seorang pegawai bank telah melemparkan kata-kata penghinaan yang menyakitkan hati terhadap pelanggan bank. Pelanggan mengadu bahawa kata-kata penghinaan atau penghinaan perkauman cukup untuk mencabar sehingga menyebabkan pelanggaran keamanan. Perayu didakwa kerana sengaja menghina pelanggan bank untuk menimbulkan pelanggaran keamanan, satu kesalahan di bawah s 504 Kanun Keseksaan. Perayu menuntut untuk dibicarakan bagi pertuduhan itu. Pada akhir perbicaraan, perayu didapati bersalah, disabitkan dan dihukum enam bulan penjara. Perayu merayu terhadap hukuman itu dan berhujah bahawa majistret telah memberikan penekanan yang tidak wajar terhadap pencegahan tanpa mengambil kira aspek mitigasi. Perayu berhujah bahawa dia adalah pesalah pertama dan sebagai seorang pegawai bank, adalah aset kepada masyarakat. Selanjutnya dihujahkan bahawa tiada keganasan sebenar yang berlaku, dan hukuman yang dijatuhkan agak berlebihan.

**Diputuskan**, menolak rayuan:

(1) Ia adalah undang-undang tetap bahawa pertimbangan utama untuk mahkamah yang mendengar rayuan terhadap hukuman adalah kepentingan awam. Dalam hal kesalahan di bawah s 504 Kanun Keseksaan, kepentingan awam adalah pencegahan penghinaan yang menimbulkan provokasi yang mungkin menyebabkan pelanggaran keamanan. Komen-komen yang menghina perayu dalam kes ini mungkin akan menyebabkan pergolakan kaum atau pelanggaran keamanan yang berlaku, dalam konteks masyarakat berbilang kaum yang wujud. Oleh itu, penghinaan itu tidak boleh dibiarkan. Ini adalah satu keadaan di mana dasar pencegahan sememangnya diperlukan. Injunksi terhadap penggunaan penghinaan perkauman adalah terpakai kepada semua lapis masyarakat berbilang kaum tanpa mengira etnik atau kedudukan dalam kehidupan orang yang berkenaan. Dalam hal ini kesamarataan dari segi undang-undang yang dijamin dalam perkara 8 Perlembagaan Persekutuan sepatutnya diutamakan di kalangan semua lapisan masyarakat. Dalam keadaan ini hukuman pencegahan adalah yang paling baik untuk memperoleh keadilan bukan hanya untuk perayu tetapi juga untuk masyarakat pada umumnya. Ini adalah satu kesalahan di mana pencegahan diperlukan untuk mencegah terjadinya pelanggaran keamanan daripada ia berlaku sebelum tindakan diambil (lihat perenggan 5–14 & 27).

(2) Bertentangan dengan hujah perayu majistret telah mempertimbangkan faktor-faktor mitigasi yang dibangkitkan oleh perayu sebelum memutuskan bahawa kesalahan yang dilakukan oleh perayu, yang bersifat tidak remeh, mewajarkan enam bulan penjara. Apabila kepentingan orang awam dan perayu bersaing diimbangi atas keadilan, kepentingan awam mengatasi kepentingan perayu. Tambahan pula, pli mitigasi yang mana tiada keganasan sebenarnya berlaku adalah tidak relevan kerana s 504 tidak semestinya memerlukan pelanggaran keamanan yang telah berlaku. Satu kemungkinan sahaja sudah cukup (lihat perenggan 16–17 & 27).

(3) Majistret adalah betul dalam memerhatikan bahawa keseriusan kesalahan itu dicerminkan oleh niat Parlimen untuk mengenakan hukuman penjara sebelum denda. Ini adalah faktor yang relevan untuk dipertimbangkan dalam menentukan keseriusan kesalahan itu. Hakikat bahawa kesalahan itu boleh dikompaun tidak bermakna ia adalah perkara yang remeh. Tambahan pula, pengenaan denda sahaja tidak akan mencerminkan keseriusan kesalahan dan akan mengakibatkan mesej yang salah disampaikan kepada orang ramai. Oleh itu, majistret tidak terkhilaf daripada prinsip dan hukuman yang dijatuhkan adalah menurut undang-undang (lihat paras 19, 23 & 30–31).]

**Notes**

For cases on appeal against sentence, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4160–4285.

**Cases referred to**

*Badri bin Abas, Re* [1971] 1 MLJ 202 (refd)
*Girish Chunder Mitter v Jatadhari Sadhukhan* (1899) ILR 26 Cal 653, HC (refd)
*PP v Jafa bin Daud* [1981] 1 MLJ 315; [1981] 1 MLRA 413 (refd)
*PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
*Rex v Abu Kassim bin Babu* [1940] 1 MLJ 243; [1940] 1 MLRH 630 (refd)
*Subbiah v Venkata Subbamma* AIR 1942 Mad 672; (1943) 44 Cri LJ 10 (Mad) (refd)
*Silvester Vaz vs Louis Dias* (1930) 32 BOMLR 103; AIR 1930 Bom 120; 31 Cri LJ 846 (Bom), HC (refd)

**Legislation referred to**

Criminal Procedure Code ss 173A, 294
Federal Constitution art 8
Penal Code ss 448, 504

*Zamani Ibrahim (Najmi Dawami Abdul Hamid with him) (Zamani Ibrahim) for the appellant.*
*Roslan Mat Nor (Chan Lee Lee with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Collin Sequerah J:**

INTRODUCTION

**[1]** The appellant abovenamed was charged in the Magistrates Court at Johor Bahru for an offence under s 504 of the Penal Code as follows:

> Bahawa kamu pada 8.4.2014 jam lebih kurang 6.00 petang di Hong Leong Bank Berhad, Aras 5, Wisma Tiong Hua, Jalan Kris, Taman Seri Tebrau, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim dengan sengaja telah mengaibkan dengan mengucapkan perkataan 'This is Hong Leong! Hong Leong! Chinese Bank you know? It is not your Najib's bank, bank Bumiputra ... stupid' dan dengan jalan demikian itu, telah mendatangkan bangkitan marah kepada Zulkefli bin Zainal (No K/P: 650227-01-5843) dengan mengetahui mungkin bahawa bangkitan marah itu akan menyebabkannya memecahkan keamanan awam, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 504 Kanun Keseksaan.

**[2]** The appellant claimed trail to the charge. At the conclusion of the trial, the appellant was found guilty and convicted. She was sentenced to six months imprisonment from date of conviction.

THE APPEAL

**[3]** The appellant initially filed an appeal against both conviction and sentence. However, on the day fixed for the hearing of the appeal, learned counsel for the appellant intimated that he was instructed to withdraw the appeal against conviction and to only pursue the appeal against the sentence passed. The only issue for consideration therefore was whether the sentence passed ought to be disturbed.

DECISION

**[4]** The function of a court in hearing an appeal against sentence is well set out in the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 which held:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
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> The principles to be applied in imposing sentence however are the same in every case. *The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence* having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. *It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.* (Emphasis added.)

**[5]** The court also held:

> *One of the main considerations in the assessment of sentence is of course the question of public interest*. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* 35 Cr App R 164 as follows:
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> > *In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest*. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may

A also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that B maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

C Presidents and Magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what D sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. *The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused.* Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560 561 offered some good advice when he said:

E > The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. (Emphasis added.)

F **[6]** The public interest is therefore the paramount consideration in sentencing. However the expression 'public interest' is only a general term. It can connote different meanings depending on the context or situation in which it is used. What then is the public interest here?

G **[7]** The answer to this question may be gathered by inquiring as to what mischief the section was intended to deter. This of course can be gathered from the very words of the section itself. Section 504 of the Penal Code reads:

> 504 Intentional insult with intent to provoke a breach of the peace
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H > Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

I **[8]** *Ratanlal & Dirajlal's Law of Crimes* (27th Ed, Vol 2) at p 3164, states that s 504 seeks to punish a person who intentionally insults to provoke breach of peace. It also states that the offence contemplated by this section is a serious one. See *Subbiah v Venkata Subbamma* AIR 1942 Mad 672; (1943) 44 Cri LJ 10 (Mad).

**[9]** The same authors say that the section provides a remedy for using abusive and insulting language. See *Girish Chunder Mitter v Jatadhari Sadhukhan* (1899) ILR 26 Cal 653. It continues to state that it requires an intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause or the knowledge that that provocation is likely to cause the person so insulted to break the public peace or commit any other offence. See *Silvester Vaz vs Louis Dias* (1930) 32 BOMLR 103; AIR 1930 Bom 120; 31 Cri LJ 846 (Bom).

**[10]** It can be discerned from the commentary above that the offence here is not a minor one. Such abusive comments could lead to severe repercussions that is likely to cause a breach of peace. Should a breach of peace occur, it is no exaggeration to say that this may involve hurt or even loss of lives to certain persons. The public interest here then is the prevention of insults that gives rise to provocation likely to cause a breach of peace.

**[11]** This is all the more so in the context of the multi-racial society in which we exist. The possibility of racial unrest occurring cannot be underestimated or ignored. Therefore such insults must not go unchecked. This is one situation where a policy of deterrence is absolutely necessary. Allowing a situation of unrest or breach of peace to fester and to occur first before taking appropriate action would be tantamount to the proverbial 'closing of the stable doors after the horses have bolted'.

**[12]** The injunction against the use of racial slurs applies to all sections of our multi-racial society irrespective of the ethnicity or station in life of the person in question. In this respect the equality before the law provision guaranteed in art 8 of the Federal Constitution resonates among all sections of our society.

**[13]** The aspect of ensuring that racial unrest must be not left unchecked was considered by the learned magistrate in his grounds of judgment when considering sentence. He noted the prevalence of offences in this country that led to racial unrest between the races due to racial slurs.

**[14]** The learned magistrate had alluded to and considered the mitigating factors in his judgment. However, he also considered the principles regarding sentencing and decided that a deterrent sentence would best achieve the ends of justice not only for the appellant but also for society at large.

**[15]** Before this court, learned counsel for the appellant argued that the learned magistrate had given undue emphasis on deterrence and there was no consideration in respect of the mitigation aspects. Counsel argued that the appellant was a first offender and as an officer of the bank, was an asset to

society. It was further submitted that no violence had actually occurred. The appellant was 46 years old and a spinster with an aged parent to support.

**[16]** The learned magistrate as evident from the grounds of decision did consider the mitigating factors advanced, contrary to the suggestion of learned counsel to the contrary. A perusal of the mitigating factors advanced however would indicate that there were only three main factors, which was the nature of the offence, the transfer of the appellant by the bank and that she had tendered her resignation. With respect to the nature of the offence, it is clear that it is not trivial in nature. The other factors also could not offset the seriousness of the crime committed.

**[17]** When the competing interests of the public and that of the appellant were weighed on the scales of justice, the public interest outweighed the interests of the appellant.

**[18]** Learned counsel for the appellant referred to the case of *Rex v Abu Kassim bin Babu* [1940] 1 MLJ 243; [1940] 1 MLRH 630, which I was given to understand is the only locally reported case of an offence under s 504 of the Penal Code and where the offence was compounded. It was thus urged upon me that this would indicate that the offence is not a serious one and therefore not deserving of a term of imprisonment.

**[19]** In this respect, I allude to the grounds of the learned magistrate where he said that the seriousness of the offence is reflected by Parliament's intention of imposing a prison sentence before that of a fine. I agree with the learned magistrate that this is a relevant factor to consider in determining the seriousness of the offence. The fact that the offence is compoundable does not mean that it is trivial in nature. As can be discerned from the relevant excerpt from *Ratanlal & Dirajlal's Law of Crimes*, the offence is indeed a serious one.

**[20]** Learned counsel further referred to the case involving Rafizi Ramly published in the *Malay Mail* online reporting on 26 January 2016. It was reported there that the said Rafizi Ramly who was the Pandan Member of Parliament, was found guilty by the sessions court for insulting UMNO members in 2014 with the intention of provoking a breach of public order under s 504 of the Penal Code and punished with a fine of RM1,800. The offence was committed at the Kajang by-election. The case involving Rafizi Ramly however can be distinguished as it did not involve an utterance of a racist but of a political nature.

**[21]** It was also submitted on behalf of the appellant that this was not a public interest case but only concerned an internal issue in the bank. It was argued that it should not therefore be blown out of all proportion especially on

social media. The appellant was transferred out as a result of this case and subsequently resigned from the bank. Under the circumstances, it was urged upon me that the appellant be bound over pursuant to s 294 of the Criminal Procedure Code or alternatively, be fined. A

**[22]** The prosecution however, objected to this request as it was contended that there were no documents tendered during the trial in respect of any extenuating circumstances such as age and antecedents. In any event, it was argued that the offence is not trivial in nature but serious. B

**[23]** The imposition of only a fine as contended for by learned counsel for the appellant would not reflect the gravity of the offence and would result in sending out a wrong message to the public at large. C

**[24]** The prosecution had submitted that should a fine be imposed, it should not be less than RM2,000 and not more than RM5,000. Although by this the prosecution indicated that they were amenable to the imposition of a fine, I did not however think that a fine was appropriate under the circumstances. D

**[25]** The prosecution also referred to the case of *Re Badri bin Abas* [1971] 1 MLJ 202, which concerned a case under s 448 of the Penal Code for house trespass which stipulates a punishment of imprisonment for a term which may extend to three years, or with fine, which may extend to five thousand ringgit, or with both. The accused pleaded guilty and the learned magistrate convicted him and bound him over under s 173A of the Criminal Procedure Code. In setting aside the order of the magistrate and sending the matter back for retrial, the High Court held, inter alia, that the offence is not of a trivial nature. E F

**[26]** As will be discerned, the punishment prescribed under s 504 of the Penal Code is of a similar nature namely, punishable with imprisonment for a term which may extend to two years, or with fine, or with both. It is clear therefore that offences which prescribe punishment involving the option of a fine are not necessarily classifiable as trivial in nature. G

**[27]** The plea of mitigation advanced by learned counsel for the appellant before this court that no actual violence was actually occasioned is irrelevant because the section does not necessarily require a breach of peace to have occurred. A mere possibility was enough. See *Ratanlal & Dirajlal's Law of Crimes* (27 Ed, Vol 2) at p 3168. In any event, as pointed out earlier, this was one offence where deterrence was necessary in order to prevent the occurrence of a breach of peace rather than waiting for it to break out before taking action. H I

**[28]** In the context of the manner in which the whole episode unfolded, the complainant had merely pleaded with the appellant to be exempted from being

transferred out of the state on personal grounds. There was no provocation rendered by him and there was no need under the circumstances for the offending words to be uttered.

**[29]** The fact that the appellant had seen fit to confine her appeal before this court in respect of sentence only does not necessarily mean that this of itself is to be taken as a mitigating factor. This was not a case where the appellant had pleaded guilty to the charge at the first instance and opportunity before the magistrates court. She claimed trial and was convicted after a full trial. It was only at the appeal stage that she decided not to pursue the appeal against conviction.

**[30]** The punishment prescribed by s 504 Penal Code is a term of imprisonment which may extend to two years, or with fine, or with both. Under all the circumstances, I do not find that the learned magistrate had erred in principle nor was the sentenced passed manifestly inadequate or grossly excessive and it was not illegal. The learned magistrate had therefore passed sentence according to law. See *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315; [1981] 1 MLRA 413.

**[31]** I see no good reason to disturb the sentence passed by the learned magistrate. The sentence of six months imprisonment was appropriate under the circumstances. In the premises, I dismissed the appellant's appeal against sentence. The sentence passed by the learned magistrate is hereby affirmed.

*Appeal dismissed.*

Reported by Kohila Nesan